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No. 01-1420

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

Petitioners,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, AND OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE STATES OF FLORIDA, ALASKA, COLORADO, DELAWARE, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The *amici* are States, along with the Commonwealth of Puerto Rico (the "*amici* States"), that care for abused, neglected and abandoned children through a system of foster care. Where foster children qualify for federal assistance under the Social Security Act, the *amici* States often serve as representative payees, and like any parent who receives social security funds on behalf of a child, the *amici* States use portions of those federal funds to meet the costs of the children's current care.

The use of foster care children's social security funds to pay for current care is consistent with, if not required by, federal statutes and regulations. This nationwide practice has proceeded for decades with the knowledge and approval of the Social Security Administration. Nonetheless, the court in *Guardianship Estate of Keffeler v. State of Washington Department of Social and Health Services*, 32 P.3d 267 (Wash. 2001), declared the practice to be contrary to federal law and ordered a Washington state agency to repay current and former foster children 19 years' worth of supposedly misused funds.

In the wake of *Keffeler*, the States are left to anticipate similar litigation – litigation that in the aggregate could seek *billions* of dollars in damages. The States are also uncertain about their conduct going forward. Compliance with federal law as interpreted by *Keffeler* would require dismantling large components of States' children's services programs, to the detriment of the children, the States, and even the social security program if *Keffeler* were later held to be in error. Yet, with the support of the Social Security Administration, the States firmly believe that *Keffeler*'s conclusion is incorrect, that the nationwide practice at issue is not contrary to federal law and should be continued, and that the States should have no liability whatsoever in these matters.

This brief will detail this situation. Ultimately, the *amici* States urge this Court to grant the requested writ and clarify the controlling federal law in this very significant area.

REASONS TO GRANT THE PETITION

I. *KEFFELER* HAS CREATED SUBSTANTIAL AND SIGNIFICANT UNCERTAINTY REGARDING CONTROLLING FEDERAL LAW BY INVALIDATING A PRACTICE LONG FOLLOWED BY THE STATES.

The Supreme Court of Washington rested its decision in *Keffeler* squarely upon federal law. That law is, of course, applicable to every State, and if Washington has violated federal law by using foster children's social security funds to pay for current care costs, then all States may be subject to similar claims for damages and injunctive relief, as the *amici* believe that *every State* follows the same practice. *Keffeler* has thus resulted in substantial and significant uncertainty regarding controlling federal law, and the decision places the States in the precarious position of not knowing how to structure their foster care programs. These problems merit the immediate consideration of the question now before the Court.

A. STATES ROUTINELY SERVE AS REPRESENTATIVE PAYEES FOR FOSTER CARE CHILDREN AND USE PORTIONS OF THE FUNDS FOR THE CHILDREN'S CURRENT CARE.

Unfortunately, our nation's prosperity and successes cannot ensure that every child's home will provide the loving, safe and nurturing environment that children require to grow and mature. Abuse, neglect and abandonment are the chief reasons that children are placed in a state's custody, and, once there, the state must attempt to meet each child's physical, emotional and developmental needs. Foster care is a term generally used to refer to the system used by states to place children in homes other than their natural or adoptive parents' homes, where foster parents or other caregivers attempt to provide a nurturing, albeit substitute, home environment.

Foster care is, by design, a temporary arrangement. Wherever possible, states aim to reunify children with their legal parents. When that cannot be accomplished, states seek to place children with new parents through permanent adoption. Foster parents offer their homes and services to children in need of care until one of these long-term goals can be met.

Particular foster care placements may last weeks, months, or, in some instances, years. Over time, a foster child may reside with numerous foster parents.

As a means to encourage adults to participate in foster care programs, states attempt to minimize the expenses that foster care parents must bear. States often look first to a child's natural parents to account for the child's foster care costs,[1] but in many instances, if not most, no parent is both available and able to pay those costs. Consequently, states generally take it upon themselves to finance the sizeable costs associated with the foster care system, utilizing any available federal assistance.

On occasion, foster children are able to contribute to the costs of their own care through their social security benefits. Many children qualify for one of two forms of federal benefits offered through the Social Security Act (the Act). First, a child under 18 may receive benefits under Title II of the Act, which provides workers with retirement, death, and disability insurance (RSDI benefits), if the child's parent is eligible to receive RSDI benefits or if the child is a surviving dependent of a deceased parent who was eligible for those benefits. 42 U.S.C. § 401 *et seq.* Second, a child who is disabled and meets certain income and resource limitations may receive benefits under Title XVI of the Act (SSI benefits). 42 U.S.C. § 1381 *et seq.* The fact that a child is in foster care is not directly relevant to the child's entitlement to RSDI or SSI benefits.

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[1] *See, e.g.*, Fla. Stat. § 402.33 (2001) (enabling state to assess foster care costs to natural parent or guardian).

When the Commissioner of Social Security determines that a recipient may be best served by payment of his or her social security benefits to a representative payee, the Commissioner may appoint such a person. 42 U.S.C. §§ 405(j), 1383(a). SSA regulations promulgated by the Commissioner generally require that a representative payee be appointed whenever a recipient is under the age of 18. 20 C.F.R. § 416.610(b). The Commissioner thus has some assurance that a responsible person will be accountable for the funds and expend them in accordance with statutory and regulatory guidelines.

Not surprisingly, foster care children generally lack an adult in their lives who can adequately serve as a representative payee. Whatever circumstances caused a child to be removed from his or her parents or guardians in the first place will likely make those persons unsuitable or unavailable to serve as a representative payee. Also, the potentially transitory nature of foster care placements makes foster care parents a poor choice – particularly when considering the lengthy procedures that must be followed before a beneficiary is determined eligible for benefits or an initial or new representative payee is approved.

Routinely, then, where a child in foster care would be eligible to receive social security benefits, the agency that administers the state's foster care program not only completes the child's application for benefits but applies to be the child's representative payee as well. For decades, the Commissioner has made such appointments, and, as a result, state agencies have been the representative payees for tens of thousands of foster children. *See* 42 U.S.C. § 405(j); 42 U.S.C. § 1383(a)(2)(B); 20 C.F.R. §§ 404.2021, 416.621 (permitting institutions to serve as representative payees).

The following chart provides general estimates of the number of children in certain States' foster care programs, along with the number of those children for whom those States serve as representative payee for social security benefits, based upon information provided by the respective States:

State	Foster Care Children	State As Rep. Payee
Florida	24000	3894
Michigan	14098	1048
New Jersey	10812	280
Washington	10578	1411
Massachusetts	10538	1350
Tennessee	9801	854
Minnesota	8362	1208
Arizona	6000	198
South Carolina	4968	500
Alaska	2337	228
Hawaii	2000	200

This arrangement is both logical and appropriate in several respects. For example, foster care children are generally considered a state's ward, and the state – not a foster parent – is deemed to be the child's legal custodian. The state's service as representative payee is thus comparable to a natural parent's service on behalf of his or her custodial child. Also, unlike nearly every other person in the typical foster child's life, the state has a constant presence, making it a stable representative payee.

Furthermore, as a prospective or appointed representative payee, States supply valuable administrative resources. State foster care programs help to determine whether a child should apply for social security benefits in the first instance, to complete the many steps involved in applying for and securing benefits, to see that only appropriate uses are made of the funds, to account to the SSA for the use of the funds, and, in the case of SSI benefits, to monitor the child's resources to ensure that the child's eligibility is preserved. *See* 20 C.F.R. § 416.1205(c) (imposing $2000 maximum on certain non-exempt resources).

Representative payees are required to expend beneficiaries' social security funds in accordance with federal statutes and the SSA's regulations. By regulation, a representative payee may use social security funds "only for the

use of the beneficiary in a manner and for the purposes he or she determines . . . to be in the best interests of the beneficiary." 20 C.F.R. §§ 404.2035(a), 416.635(a). Benefits are deemed to be used for the use and benefit of the beneficiary "if they are used for the beneficiary's current maintenance," and "current maintenance" is defined by the SSA to include "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. §§ 404.2040(a)(1), 416.640(a).

Based on these principles, states have long served as the representative payees of foster care children and, in the course of expending social security benefits "in the best interests of the beneficiary," used portions of those benefits to pay costs associated with the children's foster care: shelter, food, clothing, etc. States have done so in the good faith belief that, like any parent who receives social security benefits as the representative payee for a child, controlling federal law permits – if not requires – portions of those funds to be directed towards the children's current care.

Significantly, the *amici* States believe that *every State* follows this practice in some fashion. Furthermore, while the Commissioner is required to implement and has implemented monitoring procedures to oversee how institutional representative payees spend their beneficiaries' benefits, *see* 42 U.S.C. §§ 405(j)(3)(B), 1383(a)(2)(C)(ii), the *amici* States are aware of no SSA review of any state foster care program that has ever questioned this routine expenditure of benefits. To the contrary, the SSA's positive reviews of the States' spending practices have long given every indication that these expenditures are both lawful and appropriate. The States have relied on such indications, and on the plain meaning of the governing law, in conducting themselves to this point. As we show in the next section, the *Keffeler* decision has created substantial uncertainty regarding how the States should now proceed.

B. IGNORING *KEFFELER* COULD LEAVE THE STATES IN A POSITION OF ECONOMIC PERIL, WHILE COMPLYING WITH *KEFFELER* COULD HARM FOSTER CHILDREN, STATES, AND THE SOCIAL SECURITY PROGRAM.

According to *Keffeler*, where a state has committed itself to expend monies on the care of foster children, and where that state serves as the representative payee for foster children who receive social security benefits, the state may not expend those benefits on the children's foster care expenses. In the Supreme Court of Washington's view, the state is simply a creditor seeking reimbursement for credit extended to the children, and the expenditure constitutes a form of "other legal process" aimed at recouping the credited monies, in violation of the anti-attachment provision found at 42 U.S.C. § 407(a).[2] *Keffeler* ignored the conflict between that interpretation and the SSA's regulations that expressly permit benefits to be used for a beneficiary's current care, and the decision's holding casts a cloud of confusion over an area of federal law that should be governed by a single, national standard.

If *Keffeler* is correct, then the *amici* States, and, indeed, every State, would violate federal law each time a foster child's

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[2] 42 U.S.C. § 407(a) provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Also, 42 U.S.C. § 1383(d)(1) makes this provision applicable to SSI benefits.

social security funds are used to pay a portion of the child's care costs. A prudent desire to comply with federal law might suggest that States immediately alter that practice, if *Keffeler* is believed correct, but this matter involves significant considerations that preclude a simple solution, and the *amici* States do not believe that *Keffeler* is correct.

Also, if *Keffeler* is an accurate statement of federal law, then the States may be subject to claims by foster children for the supposed misuse of their social security benefits – a potential liability that can by no means be considered insignificant. For example, during its 2000-2001 fiscal year, the State of Florida received approximately $12.7 million in social security payments for foster children for whom the State served as representative payee. Of that $12.7 million, approximately $8.4 million were used on behalf of the intended beneficiaries to pay for foster care expenses such as room and board. Considering that the plaintiff class in *Keffeler* seeks damages for supposedly misused benefits over a 19-year period, it is manifest that the damages exposure for states such as Florida could reach hundreds of millions of dollars. This exposure will increase with each month that the supposedly unlawful conduct continues.

At the same time, compliance with *Keffeler* at this point – without any confirmation from this Court that the case correctly interprets the controlling federal law – could create significant hardships upon foster care children, the States, and the SSA, all of which would be unnecessary if the decision is determined at some later point to be in error. Absent the ability to utilize foster children's social security benefits to help pay for the care that states provide, states may find it difficult, on a financial level, to justify undertaking the massive, costly efforts required to serve as representative payees. If states do not serve as representative payees, the SSA and eligible children may be put to considerable trouble to attempt to locate suitable alternative payees, and the administrative, accounting and auditing advantages gained by using institutional representative payees would, in all likelihood, be lost. In addition, dismantling the administrative departments

that currently support the States' efforts as representative payees would be a costly and wasteful endeavor if subsequent litigation determined that *Keffeler* was incorrectly decided and those experienced departments needed to be reconstituted. In all events, the States would lose the benefit of millions of dollars in federal funds that are intended to be spent on their recipients' care.

Finally, it bears emphasis that the knowing misuse of social security benefits by a representative payee is a felony. 42 U.S.C. § 408(a)(5). The States have never intended and do not intend to violate the law by administering foster children's social security benefits consistent with the SSA's regulations.

For all of these reasons, *Keffeler* leaves the States in a difficult position, and only this Court's guidance regarding the federal law at issue can resolve the substantial and significant uncertainty that the case creates. The requested writ of certiorari should be granted.

II. *KEFFELER* CONFLICTS WITH REGULATIONS ADOPTED BY, AND STATUTORY INTERPRETATIONS MADE BY, THE SOCIAL SECURITY ADMINISTRATION.

The *amici* States firmly believe that *Keffeler* was wrongly decided. In support of this position, the *amici* States rely on the regulations adopted by, and the statutory interpretations made by, the SSA, which is the agency charged with the Act's administration. The conflict between the Commissioner's views and the *Keffeler* decision – in an area that calls for national uniformity – presents another important reason that the Court should grant the requested writ of certiorari in this case.

As previously discussed, the SSA's regulations expressly permit representative payees to utilize a beneficiary's social security benefits in the manner that the payee determines is in the beneficiary's best interests, and benefits used for the beneficiary's current maintenance are expressly considered to be

used for the beneficiary's use and benefit. 20 C.F.R. §§ 404.2035(a), 404.2040(a)(1), 416.635(a), 416.640(a). The Supreme Court of Washington disagreed, concluding that a state agency's decision to use foster children's benefits for their current maintenance constitutes "other legal process" that reimburses a creditor, in violation of 42 U.S.C. § 407(a).

The effect of *Keffeler* is to create an exception to the SSA regulations that precludes expenditures on current maintenance, at least where the representative payee would otherwise be obliged to satisfy the expense. There is no principled reason why this exception would not apply to parents who are obligated to care for their children just as well as it would apply to state agencies that are obligated to care for their wards.

This exception is not only unworkable, it is contrary to the SSA's interpretation of its regulations and the statutes it administers. As discussed above, the SSA has overseen the States' service as representative payees for foster children for decades and, to the *amici* States' knowledge, has always approved – and never contested – the use of benefits for the children's care. Furthermore, the Commissioner filed two briefs in the *Keffeler* litigation in support of Washington's practice, Petition at 13, and, in its decision, the Supreme Court of Washington not only neglected to confront the Commissioner's views, it declined even to acknowledge them.

This Court has clearly held that, where Congress has not directly spoken to the precise question at issue, an approach taken by the agency charged with administering a statutory scheme will be sustained so long as it is "based on a permissible construction of the statute." *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Further, the Commissioner's interpretation of her own regulations – even where expressed through an *amicus* brief – is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, 419 U.S. at 461 (quotation omitted).

In refusing to acknowledge the Commissioner's views on whether the state action in question violates the anti-attachment restriction found in section 407(a) or is permitted because of the state's representative payee status, the Supreme Court of Washington failed to consider the deference that this Court's precedent requires those views be given. As a result, the national uniformity that should exist in this area has been broken, and, to its detriment, Washington has been left outside the system currently followed by the remainder of the States – States that continue to rely on the Commissioner's position. To restore the uniformity needed in this area, and to resolve the conflict between the Commissioner's views and the *Keffeler* decision, this Court should grant the requested writ of certiorari.

III. *KEFFELER* CONFLICTS WITH DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND STATE COURTS.

The final reason that the Court should grant a writ of certiorari in this case is that *Keffeler* conflicts with decisions of the United States circuit courts of appeals and state courts, decisions upon which States have relied and, in good faith, will continue to rely. Only this Court can resolve this conflict.

In *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), *cert. denied sub nom. Crytes v. Schafer*, 502 U.S. 1095 (1992), a group of RSDI recipients sued the director of Missouri's department of mental health. They argued that the state violated 42 U.S.C. § 407(a) when its mental health institutions were appointed as the plaintiffs' representative payees and when, as representative payees, the institutions decided to use portions of the plaintiffs' benefits to pay for their current maintenance. The Eighth Circuit flatly rejected both contentions and held that the state had not used "other legal process" to reach the plaintiffs' benefits. According to the Eighth Circuit, section 407(a) was not intended to outlaw a procedure expressly authorized by the SSA's own regulations. *Id.* at 1185-86.

Soon after *King*, the Supreme Court of Alaska confronted a similar argument. In *C.G.A. v. State of Alaska*, 824 P.2d 1364 (Alaska 1992), a minor appealed an Alaska court's decision that the State of Alaska could, as a minor's representative payee, use the minor's social security funds to pay for the minor's care in a state institution. The minor argued that section 407(a) precluded the state from "seiz[ing] his benefits" in a manner contrary to his wishes. The state supreme court disagreed. Noting the absence of attachment proceedings, the court held that the SSA's regulations permitted the state to serve as representative payee and to use some or all of the minor's benefits to pay for his institutional care. *Id.* at 1369.

Most recently, the Seventh Circuit reached the same result. In *Mason v. Sybinski*, 280 F.3d 788 (7th Cir. 2002), state hospital patients sued the hospital, which had been appointed their representative payee, and argued that because the hospital was obligated to provide them with care without respect to their ability to pay, section 407(a) precluded the hospital from using the patients' social security benefits to pay for that care. Observing that the expenditures were consistent with the SSA's regulations and the hospital's status as representative payee, the Seventh Circuit rejected the patients' argument and held that no "other legal process" was being used in violation of section 407(a). *Id.* at 793-94.

Finally, a Maryland appellate court recently held that no violation of section 407(a) occurred when a committed mental health patient's social security benefits were used to pay a state agency for the patient's current care and maintenance. *Ecolono v. Division of Reimbursements of the Department of Health and Mental Hygiene*, 769 A.2d 296 (Md. Ct. App. 2001). The agency's director was the patient's representative payee, and the court concluded that the use of benefits by the payee did not involve "other legal process" as contemplated by the anti-attachment provision.

The important question presented by this case is thus ripe for this Court's review. *Keffeler* was by no means the first

decision to consider whether a representative payee may utilize social security benefits to pay for current care that the payee provides the beneficiary. *Keffeler* was, however, the first decision to declare squarely that such use by a representative payee constitutes a misuse of benefits and a violation of 42 U.S.C. § 407(a). The *amici* States strongly disagree with *Keffeler* and have long relied on the rationale offered by the contrary line of authorities. To resolve this clear and significant conflict in the case law, the *amici* States urge the Court to review the decision in *Keffeler*.[3]

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[3] A New York decision – *Muller v. State of New York*, 686 N.Y.S. 2d 652 (N.Y. Ct. Cl. 1999), *affirmed without opinion*, 719 N.Y.S.2d 916 (N.Y. App. Div. 2001) – appears to conclude that the director of a mental health center violated § 407(a) by paying the state portions of a beneficiary's social security benefits, where the director had been appointed the beneficiary's representative payee. The case, however, principally concerned past maintenance costs, and the decision did not distinguish between expenditures for past and current maintenance. Moreover, the case turned largely upon an independent question of state law, which arguably reduces the case's unclear and perhaps erroneous federal law pronouncements to dicta.

CONCLUSION

For each of the foregoing reasons, this Court should grant the writ of certiorari requested in this case by the Washington State Department of Health and Social Services.

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